David Young for the appellant.
Jimmy Wee for the respondent.

Cur Adv Vult

Mayo Commissioner (delivering the judgment of the court): This is an appeal against the judgment of Mr Commissioner Wong dated 4 April 1990. We propose adopting a similar approach to that adopted by the Commissioner of dealing with the two cases together as the issues arising out of them are almost in all respects identical and the parties agreed to this course. It seems to us that the most substantial ground of appeal is the complaint that the indorsement on the bankruptcy notice was defective. This is ground four of the appeal and reads as follows:

> That in considering r 45(3) of the Bankruptcy Rules (which provides that in the case of bankruptcy notices served in Brunei the indorsement shall specify a period of three (3) days for filing an affidavit) the learned judge wrongly decided that seven (7) days was the correct period (that being the period specified under s 3(1)(g) for determining the questions raised in the affidavit) and that having so decided the learned judge thus failed to address the question of whether a notice incorrectly indorsed was capable of misleading the judgment debtor or whether or not it was in the prescribed form.

It is evident from the indorsement on the bankruptcy notices in both cases that the time given for making an application to set aside the notice on the ground that the debtor had a set-off or counterclaim in a sum equal or exceeding to the judgment debt was seven days, namely, the same period as the period referred to in the body of the notice for compliance with the terms of the notice failing which an act of bankruptcy would have been committed.

The consequence of this irregularity is quite serious. If the debtor waited for seven days before making the application to set aside the notice the act of bankruptcy would already have occurred. Mr Wee for the judgment creditor invited us, as he did Mr Commissioner Wong, to invoke the provisions contained in s 124 of the Ordinance on the ground that no prejudice had in fact been occasioned by the irregularity and that it was clear from the debtor's affidavit which was subsequently filed that she did not have any set-off or counterclaim sufficient to enable an application to set the notice aside to have any prospect of success.

With respect, we do not consider that this would be a proper exercise of any discretion deposed in the court under s 124. It is clear that bankruptcy proceedings are of a quasi-penal nature and it is imperative that the procedural requirements are strictly complied with. We are of the view that the indorsement on the notice was so defective as to amount to an irregularity which cannot be cured by the provisions contained in s 124.

For this reason, the decision of Mr Commissioner Wong must be set aside. This disposes of the appeal and we do not propose commenting upon the other grounds. These appeals accordingly succeed and we will hear the parties on costs.

Appeals allowed.

Solicitors: *Bonds; Joseph Hoo, Morris & Lal.*

Reported by *Kevin Mathews*

International Bank of Brunei Bhd v Hock Hin Trading Co

COURT OF APPEAL (BRUNEI) — CIVIL APPEAL NO 3 OF 1990
TI LIANG YANG P, FUAD AND MAYO COMMISSIONERS
24 MAY 1990

Civil Procedure — Appeal — Preliminary objection — Leave to appeal — Failure of appellant to apply — Effect of — Brunei Preliminary Rule 2(2) — Supreme Court Rules, O 45 & O 55.1(1) — Rules of the Supreme Court [UK], O 59 r 1

In this appeal, the respondent raised a preliminary objection on grounds that, inter alia, the appellant had failed to apply for leave of the learned judge below to appeal when leave of the judge was necessary.

Held, dismissing the preliminary objection:

(1) The requirement for obtaining leave is clearly contemplated in the Brunei Supreme Court Rules. The failure to set out the different cases where leave is required amounts to a shortcoming or lacuna of the type for which Brunei Preliminary Rule 2(2) is designed, ie reference is made to *The Supreme Court Practice.*

(2) The failure to obtain leave is only a procedural irregularity and it is open to the court to enlarge the time for the appellant to seek leave to prosecute the appeal.

Cases referred to

1 *Brunei Transporting Co* v *Wong Ba Jun* (Suit No 134/88) (unreported) (folld)
2 *Hamzah bin Abdul Majid & Anor* v *Sungei Way Leasing Sdn Bhd* [1986] 1 MLJ 471 (not folld)

Legislation referred to

Brunei Preliminary Rule 2(2)
Supreme Court Rules O 45, O 55.1(1)
Rules of the Supreme Court [UK] O 59 r 1

Aishah Alkaff (Mrs) for the appellant.
Irene Appaduray (Mrs) for the respondent.

Cur Adv Vult

Mayo Commissioner (delivering the judgment of the court): The respondent is moving this court for an order

that it should not entertain this appeal. This is done by way of a preliminary objection. Mrs Appaduray has filed an affidavit in support of the motion in which she sets out four grounds of objection.

It would seem to us that the most substantial ground is the third one which reads as follows:

> The appellant has failed to apply for leave of the learned judge below to appeal when leave of the judge is necessary.

Mrs Appaduray referred us to O 55.1(1) of the Supreme Court Rules which reads as follows:

> Where leave to appeal is required, the application for such leave, if not made at the time when the judgment or order against which it is desired to appeal is given or made, may be made ex parte in Chambers to a Judge, before the expiration of the time limited by rule 3 for bringing the appeal.

The period in r 3 is 21 days. It is common ground between the parties that no application was made to the judge within that period.

The judgment or order made by Mr Commissioner Wong was in respect of interpleader proceedings. Mrs Appaduray submitted to us that it was well established practice in Brunei for leave to be applied for in appeals relating to interpleader hearings. In support of this contention she referred to a passage at p 2 of the judgment of the Chief Justice Sir Denys Roberts in *Brunei Transporting Co* v *Wong Ba Jun*:[1]

> Since O 45, which deals with interpleader actions, makes no mention of appeals, it is necessary to refer to the White Book, under Brunei Preliminary Rule 2(2). By O 58 r 7 of the English rules, leave to appeal to the Court of Appeal is required where a judge-in-chambers make an order in an interpleader summons.

Mrs Alkaff for the appellant does not accept that this statement of the law is correct. She argued that the whole scheme of interpleader applications in Brunei is different from the English practice. It further occurs to us that one would not necessarily look to O 45 of the Rules to ascertain whether leave to appeal was necessary. It would seem to be more logical to examine O 55 which sets out provisions in respect of appeals.

However, it is evident that there is no provision in O 55 setting out the types of application where leave is required. This is contrary to O 59 r 1 of the English Rules where all the different cases requiring leave are conveniently set out.

The requirement for obtaining leave is clearly contemplated in the Brunei Supreme Court Rules. The failure to set out the different cases where leave is required amounts to a shortcoming or lacuna of the type for which Brunei Preliminary Rule 2(2) is designed.

The next question which has to be considered is the application of Preliminary Rule 2(2). We are satisfied that interpleader applications are proceedings for which leave is required, and this being the case, the appellants should have obtained leave from Mr Commissioner Wong.

What is the effect of not obtaining leave? There is a helpful commentary on this in the notes in *The Supreme Court Practice* on p 853 which is commenting on O 59 r 1 at 59/1/24. It is clear that the failure to obtain leave is only a procedural irregularity. This being the case, we are satisfied that it is open to us to enlarge the time for the appellants to seek leave to prosecute the appeal.

We are satisfied that the circumstances of the case are such that time should be enlarged sufficiently to enable the appellants to obtain leave. The wording of O 55 would not appear to permit us to ourselves grant leave to the appellants to prosecute the appeal. It would appear that it will be necessary for the matter to be referred back to Mr Commissioner Wong for this. However, as he is not presently in Brunei, the course to adopt would be to refer the application to the judge who is here to try cases at first instance, Commissioner Mayo.

We do not see any great merit in the other objections which have been raised by the respondents. Mrs Appaduray argued that the appellant's failure to comply with the requirements by O 51/7/23 amounted to a failure to 'bring the appeal properly'. Her authority for this proposition was the case of *Hamzah bin Abdul Majid & Anor* v *Sungei Way Leasing Sdn Bhd.*[2] We find it difficult to follow the logic of this decision. It is quite clear from the wording of 51/7/23 that the further reference to the judge is discretionary. The word 'may' is used. We do not consider that the appellant's failure to invoke this order has any adverse effect against this appeal.

Mrs Appaduray complained that she was not served timeously with the record of the proceedings. This would certainly not constitute good grounds for refusing to hear the appeal. If the respondents have suffered any prejudice from this, it would always be open to them to seek an adjournment.

This deals with all the outstanding points raised on the motion. For the reasons we have given we would dismiss it.

Preliminary objection dismissed.

Solicitors: *Ibrahim, Chee & Co; Shelley Yap & Irene Appaduray.*

Reported by *Kevin Mathews*